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No. 82-63.

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

CITY OF REVERE,
PETITIONER,

v.

MASSACHUSETTS GENERAL HOSPITAL,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Brief of Amici Curiae, American Civil Liberties Union, Civil Liberties Union of Massachusetts, and Massachusetts Correctional Legal Services.

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The judgment below should be vacated and the case remanded because (1) this Court lacks the benefit of a lower court opinion applying the correct legal standard, (2) the factual record is inadequate to resolve the constitutional question presented, and (3) a recent state statute of which the lower court was unaware may obviate the need for constitutional adjudication.

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BRIEF OF AMICI CURIAE, AMERICAN CIVIL LIBERTIES UNION, CIVIL LIBERTIES UNION OF MASSACHUSETTS, AND MASSACHUSETTS CORRECTIONAL LEGAL SERVICES

Interest of Amici*

The amici are organizations committed to the protection of civil liberties, including the right to medical treatment for those in police custody. Ordinarily, the question of how these services are financed is one that raises no civil liberties concerns, so long as the individual right to medical treatment is respected and guaranteed. There may be cases, however, where effective preservation of the right to treatment demands that the costs be imposed on the city or town. There may also be cases where, because of constitutional violations committed by the city or town,

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*Letters from the parties consenting to the filing of this brief have been lodged with the Clerk.

consequential costs should rightly be imposed on them. In these circumstances, due process may well require a city or town to pay for medical treatment of a suspect in its custody.

Whether or not this is such a case is totally unclear. The liability issue is presented here only in the most abstract and theoretical form, without benefit of a lower court opinion on point or a developed factual record. Because amici are concerned with preserving the underlying right to medical treatment, and because it is virtually impossible to be certain on this record of the extent to which that right requires funding by the city in this or any other case, we urge this Court to remand this case to the Massachusetts Supreme Judicial Court for

reconsideration under the appropriate legal standard and for the development of a needed factual record.

Summary of Argument

This Court has long adhered to a policy of "strict necessity" in adjudicating constitutional claims, refusing to resolve constitutional questions which have not been properly developed below or whose resolution may not be necessary to dispose of the case. In the court below, this case was briefed, argued, and decided as an eighth amendment cruel and unusual punishment case; this Court's decisions mandating scrutiny under the due process clause of the fourteenth, rather than the eighth, amendment were never mentioned. A remand would afford

the state court the opportunity -- its first -- to pass on the fourteenth amendment claim, and would provide this Court with the benefit of a lower court opinion on point before it decides important constitutional questions.

A remand is necessary in any event to develop the factual record. Even were this Court tempted to reach the merits of the fourteenth amendment claim, the factual record appears inadequate on its face for the required inquiries. There is simply nothing in the record relating to critical issues such as whether and when payment may be necessary to secure treatment, and whether the city was responsible for the injury through the use of excessive force. As a result, any constitutional inquiry at this stage

must take place almost entirely in the abstract, and at least some conclusions of such an inquiry may turn out to be purely advisory.

Finally, a remand may alter the nature of the constitutional inquiry, or even eliminate the necessity of it altogether. Subsequent to the events at issue in this case, Massachusetts enacted a new statute governing the provision of emergency medical care by hospitals in the state. That statute at least arguably ensures medical care without regard to ability to pay, and therefore may answer the question whether municipal liability is essential to ensure treatment, which has been the gravamen of the hospital's argument. A remand would allow the Massachusetts

court to rule on the impact of the new statute.

ARGUMENT

THE JUDGMENT BELOW SHOULD BE VACATED AND THE CASE REMANDED BECAUSE (1) THIS COURT LACKS THE BENEFIT OF A LOWER COURT OPINION APPLYING THE CORRECT LEGAL STANDARD, (2) THE FACTUAL RECORD IS INADEQUATE TO RESOLVE THE CONSTITUTIONAL QUESTION PRESENTED, AND (3) A RECENT STATE STATUTE OF WHICH THE LOWER COURT WAS UNAWARE MAY OBVIATE THE NEED FOR CONSTITUTIONAL ADJUDICATION.

This case was briefed, argued, and decided below as a case about the requirements of the cruel and unusual punishment clause of the Constitution. The disagreement between the city and the hospital centered on the question of when the protections of the eighth amendment are triggered: the hospital asserted that the amendment applied to

all those within police custody, while the city claimed that incarceration, rather than custody, was the trigger. The court held for the hospital, concluding that custody, rather than incarceration, triggered the protection of the eighth amendment and that the protection included an obligation on the municipality to pay for needed medical treatment.

The question of when the eighth amendment's protections are triggered is one which had previously been resolved in a quite different manner by this Court's decisions in Bell v. Wolfish, 441 U.S. 520 (1979) and Ingraham v. Wright, 430 U.S. 651 (1977):

> Eighth amendment scrutiny is appropriate only after the State has complied with the

> constitutional guarantees traditionally associated with criminal prosecutions. See United States v. Lovett, 328 U.S. 303, 317-318. . . .[T]he state does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law. Where the state seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment. Ingraham v. Wright, 430 U.S. 651, 672 n. 40 (1977).

Thus, in Bell v. Wolfish, supra, this Court held that the conditions of detention of those who were both in custody and incarcerated, but had not been tried or convicted, should be judged not under the standard of the eighth amendment, but rather of the due process clause of the fourteenth amendment.

The City of Revere now argues that the lower court decision imposing on

it, under the eighth amendment, an obligation to pay for the medical treatment of a suspect in its custody is flatly inconsistent with Bell and Ingraham. But it cited neither case to the court below, and that court proceeded in apparent ignorance of this Court's controlling holding. The Massachusetts Supreme Judicial Court has yet to apply the appropriate fourteenth amendment standard and rule on the separate due process claim.*

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*It cannot be assumed that the state court's analysis under the fourteenth amendment would inevitably track its analysis under the eighth amendment. To be sure, there would seem to be little question that the fourteenth amendment protects those in custody prior to trial at least against the deliberate indifference to their medical needs which the eighth amendment, as construed by this Court in Estelle v. Gamble, 429 U.S. 97 (1976), prohibits as to convicted offenders; indeed, the protection may in fact be broader where no conviction justifies punishment. Cf. Youngberg v. Romeo, 102 S.Ct. 2452 (1982).
(cont'd)

In similar circumstances, this Court has repeatedly held that the proper procedure is to remand to the court below for reconsideration under the appropriate constitutional standards, rather than to decide important constitutional issues for the first time without the benefit of a lower court opinion. Thus, where state supreme courts have misread or misinterpreted prior decisions of this Court, this Court has remanded the cases for reconsideration under the correct standard. See, e.g., Moore v. Arizona, 414 U.S. 25, 26 (1973) (remand to

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On the other hand, the obligation of the state or city to pay for the treatment may be different in the pre-conviction period; the presumption that an individual, because he is in custody, is without funds or insurance may have less application to those who have only recently been arrested than to convicted offenders serving prison terms.

Supreme Court of Arizona for reconsideration whether the state court "was in fundamental error in its reading of Barker v. Wingo and in the standard applied in judging petitioner's. . . . claim"). See also Stanton v. Stanton, 429 U.S. 501, 503-504 (1977) (remand where the Utah Supreme Court "misunderst[ood]" initial opinion of the Supreme Court). Similarly, where new claims are framed and argued for the first time in this Court, as is true of the fourteenth amendment claim here, a remand for consideration of these claims by the lower court in the first instance has been ordered. See, e.g., Wood v. Georgia, 450 U.S. 261 (1981) (remand for consideration of potential conflict of interest issue raised by the record in the Supreme

Court); Yoakim v. Miller, 425 U.S. 231, 235-236 (1976) (remand for consideration of issue of potential conflict between federal and state law which emerged and was pressed initially in Supreme Court).

Such a course is particularly appropriate where, as here, the factual record is so opaque and so ambiguous as to render a constitutional decision at this point both abstract and advisory. This Court has consistently insisted that constitutional issues be presented "in clean-cut and concrete form," Rescue Army v. Municipal Court, 331 U.S. 549, 584 (1947), and has refused to adjudicate legal claims where the record does not "adequately flush" the underlying factual issues, Cogwill v.

California, 396 U.S. 371 (1970) (Harlan, J., concurring). See, e.g., Wainwright v. New Orleans, 392 U.S. 598 (1968); Kennedy v. Silas Mason Co., 334 U.S. 249, 257 (1958); Dombrowski v. Eastland, 387 U.S. 82 (1967). See also Minnick v. California Department of Corrections, 452 U.S. 105, 123-127 (1981) (state court decision held not final because of, inter alia, ambiguities in the record); Ellis v. Dixon, 349 U.S. 458, 462, 464 (1955) (Court lacks jurisdiction where record was too "amorphous" for adjudication by either the Supreme Court or the state court).

In this case, neither the two page agreed statement of facts, nor the record as a whole, contains sufficient information to pose concretely, let

alone flush adequately, the question whether due process requires Revere to pay for medical treatment of a suspect in order to ensure that his right to such treatment is secured.* There is no agreement, and no information, as to whether Mr. Kivlin had private or public insurance or resources sufficient to pay for his medical treatment, and whether this would have had any impact on his admission treatment. There is no information on what arrangement, if any, the Revere officers who transported Mr. Kivlin made with the hospital. Nor is there any information on whether the

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*At no time in this litigation has Revere suggested that it was not obligated to secure emergency treatment for Mr. Kivlin. See Brief of Petitioners at 12.

hospital ever attempted to secure compensation -- or could have -- from any source other than the City. There is no information as to the hospital's general practice with respect to indigent or uninsured patients or patients under arrest. There is also no information as to why Mr. Kivlin was brought to this particular hospital, and whether he might have received equivalent treatment at another hospital had Massachusetts General refused to treat him. There is no information as to public hospitals in Revere or Boston, and their availability and practices. In short, the record as it stands now is simply too "vague and empty," Ellis v. Dixon, supra, 394 U.S. at 462, to allow this Court to determine, one way

or the other, whether payment by Revere is necessary to effectuate the right to needed treatment.

Nor does the record support adjudication at this point of the question whether the Constitution might require government to bear the costs of medical treatment made necessary by police use of excessive force in effecting arrest. There is no agreement by the parties, and no finding by the court, as to whether the force in this case was in fact excessive. There is nothing in the record as to whether Mr. Kivlin was armed. There is nothing as to whether police had any reason to believe he was armed. There is nothing as to the procedures in force in Revere or in Massachusetts concerning police use of force,

as to police compliance with these procedures, or as to any pattern of practice of use of force. Here, again, the constitutional issue is a purely abstract one, and there is little reason to expect that a decision by this Court would be more than advisory.

In Kennedy v. Silas Mason Co., 334 U.S. 249 (1948), this Court refused to review the statutory issues relating to overtime compensation under the Fair Labor Standards Act which had been decided by the lower court in granting summary judgment. Instead, the case was remanded for development of a proper factual record. Justice Jackson explained the Court's action:

> We consider it the part of good judicial administration to withhold decision of the ultimate question involved in this case until this or

> another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide.
>
> Without intimating any conclusion on the merits, we vacate the judgments below and remand the case to the District Court for reconsideration and amplification of the record in the light of this opinion and of present contentions. 334 U.S. at 257.

These policies of "good judicial administration" have even greater force where, as here, the ultimate questions are constitutional rather than statutory in nature, and the additional "policy of strict necessity in disposing of

constitutional issues," is thus applicable. Rescue Army v. Municipal Court, 331 U.S. 549, 568 (1947). See Board of Education, Island Trees Union Free School District v. Pico, 102 S.Ct. 2799, 2817 (1982) (White, J., concurring).

In this case, moreover, a remand may well accomplish more than the development of the factual record. It may alter substantially the constitutional questions at issue, or even render resolution of them wholly unnecessary.

Subsequent to the filing of this lawsuit, Massachusetts enacted a new statute requiring all hospitals in the state with a certified emergency unit to provide emergency services to those in need "without discrimination on account of economic status or source of

payment and without delaying treatment for purposes of prior discussion of the source of payment. . . ." Mass. Gen. Laws Ann. c. 111 § 70E (k) (West 1982). The state court held Revere financially liable in this case precisely because it concluded that such liability was required "[t]o ensure Kivlin's right to medical care." (A. 29) This new statute, nowhere mentioned or apparently considered in the proceedings and opinion below, suggests the possibility of a different conclusion.* At the very least,

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*In its brief to this Court, Revere now also argues that municipal liability is unnecessary in view of the obligations imposed on hospitals by the federal Hill-Burton Act, c. 958, § 601 et seq., 60 Stat. 1041 (1946) codified at 42 U.S.C. § 291 (1976), Title XVI of the Public Health Service Act, 42 U.S.C. 3000-3(b)(1)(J) and 42 C.F.R. § 124.603(b)(1). See Brief of Petitioners at 14. The obligation imposed on a hospital by these statutes and regulations turns on the

it is likely to alter the constitutional inquiry, since the hospital can no longer claim that it would not provide treatment without a guaranty of payment; at most, depending upon the interpretation of the state court, the statute may even render the specific constitutional inquiry in this case unnecessary. In this situation, a remand to the state court to consider the effect of the new state statute, prior to any ruling on the constitutional issue, is clearly in order. See Thorpe v. Housing Authority, 386 U.S. 670, 673 (1967) (remand where case would assume a different

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receipt of grant assistance from the federal government. There is, however, nothing in the record before this Court to indicate whether Massachusetts General Hospital has received such assistance and would be obligated to provide the care and treatment which was required by Mr. Kivlin.

posture, and constitutional issue might be avoided, were new HUD directive applied to the petitioner); Bell v. Maryland, 378 U.S. 226 (1964) (remand to state court to consider the effect of a supervening change in state law; constitutional issues not reached); Missouri ex rel. Wabash Railway Company v. Public Service Commission, 273 U.S. 126 (1927) (same).* See also Alma Motor Co. v. Tinker-Detroit Axle Co., 329 U.S. 129 (1946) (duty to decide all statutory issues before reaching constitutional questions); Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101 (1944) (same).

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*The fact that the statute here was passed prior to the decision, rather than after it, does not undermine the argument in favor of a remand. It appears that the statute was not brought to the attention of the state court.

CONCLUSION

For the foregoing reasons, amici respectfully submit that the decision of the Massachusetts Supreme Judicial Court should be vacated, and the case remanded for further proceedings.

Respectfully submitted,

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